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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-185

ERNEST E. BYRD,
Petitioner,

v.

DISTRICT OF COLUMBIA ALCOHOLIC
BEVERAGE CONTROL BOARD
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA
COURT OF APPEALS**

JOHN LOUIS SMITH, JR.
9th Floor, Presidential Bldg.
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Counsel for Petitioner

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DISTRICT OF COLUMBIA ALCOHOLIC BEVERAGE CONTROL BOARD

Respondent.

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the District of Columbia Court of Appeals entered in this case on May 4, 1972.

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CITATIONS TO OPINIONS BELOW

The Order of the Alcoholic Beverage Control Board in the District of Columbia is appended hereto as Appendix A. The opinion of the District of Columbia Court of Appeals has been reported in 289 A2 877, and is appended hereto as Appendix B.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on May 4, 1972, following the denial of a hearing en banc. See Appendix C. The jurisdiction of the Court is invoked under Title 28 U.S. Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied due process in a hearing before the Alcoholic Beverage Control Board in the District of Columbia, which resulted in his being required to resign as an officer and director of certain corporations which hold Class "C" Liquor Licenses even though the Board did not make a finding that petitioner did not possess good moral character which was the allegation made in their Show Cause Order and to which he was required to defend.

2. Whether petitioner was denied due process of law in that the Board lacked substantial evidence to suspend petitioner's license since this action was based on one isolated incident.

3. Whether the decision of the Boardmembers was arbitrary, capricious and unreasonable, amounting to a denial of fundamental due process based on personal prejudice and bias of the Boardmembers reflected by correspondence after the hearing.

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CONSTITUTIONAL AND STATUTORY REFERENCES

Constitution of the United States, Amendment V:

> "(No person shall) be deprived of life, liberty or property, without due process of law."

District of Columbia Code, Section 25-115(a) through (a)(1):

> "(a) Any individual, partnership, or corporation desiring a license under this chapter shall file with the Board an application in such form as the Commissioners may prescribe, and such application shall contain such additional information as the Board may require, and (except in the case of an application for a manufacturer's license, retailer's license, class E or solicitor's license) shall contain a statement setting forth the name and address of the true and actual owner of the premises upon which the business to be licensed is to be conducted. Before a license is issued the Board shall satisfy itself:
>
> 1. That the applicant, if an individual, or, if a partnership, each of the members of the partnership, or, if a corporation, each of its principal officers and directors, is of good moral character and generally fit for the trust to be in him reposed."

STATEMENT OF THE CASE

Petitioner, Ernest E. Byrd (hereinafter "petitioner") was a principal officer and a member of the Board of Directors of seven corporations[1] which applied to the

[1]Only three of the seven original corporations are still involved in this litigation in that petitioner continues with Board approval to own 100% of the stock of 2447 Good Hope Road, Inc., t/a

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Alcoholic Beverage Control Board (hereinafter "Board") for the reissuance of their Retailer's Class "C" Liquor Licenses.

On January 26, 1970, the Board issued an Order to Show Cause why their applications should not be denied stating that "It is proposed that such action be taken based upon the character of one Ernest Byrd. . . ."

The Order then set out allegations pertaining to a simultaneous assault with a dangerous weapon by the petitioner upon James F. O'Donnell and Stanley Januelwicz on October 22, 1969, in the Sportsman's Lounge. This restaurant is not owned by petitioner nor by either of the other parties involved in the altercation. It further stated that petitioner violated the laws of the District of Columbia by the carrying of a dangerous weapon.

A final allegation states:

> "By virtue of the conduct as set forth above, it is alleged that Ernest Byrd does not possess the good moral character required of an individual, partnership member or principal officer or director of a corporation, by Section 14(a)(1) of the Alcoholic Beverage Control Act, and has failed to carry out the good faith provision of Section 17 of said Act." Appendix D.

Clancy's No. 3, License No. X122 at premises 2447-51 Good Hope Road, S.E., Application No. 8437; 2301 Bladensburg Road, Inc., t/a Clancy's No. 1, Holder of Retailer's Class "C" License No. X306 at premises 2301 Bladensburg Road, N.E., Application No. 9557 and 2213 Wisconsin, Inc., t/a The Beef Palace, Holder of Retailer's Class "C" License No. X396 at premises 2213 Wisconsin Avenue, N.W., Application No. 9534.

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A hearing was held on January 14 and 15, 1971, at which the Corporation Counsel's case was based solely upon evidence relating to the alleged assaults at the Sportsman's Lounge. The government did not produce any other evidence reflecting upon the petitioner's character.

Petitioner called nineteen character witnesses, all of whom testified as to petitioner's reputation throughout the community for good character. The alleged victim of the incident, Stanley Januelwicz, in response to a question as to petitioner's reputation in the community by Boardmember Rufus Peckham, stated:

> "I don't hear anybody saying anything bad about him."

By Order dated February 19, 1971, the Board suspended petitioner from all officerships and/or directorships in the licensed corporations and from an active role in the management of the business of these corporations. This suspension was to remain in effect until the final disposition of the criminal charges growing out of this incident.[2]

The findings of the Board in the Order of February 19 were as follows:

> "... the serious nature of the criminal charges now pending against Mr. Byrd and the evidence supporting those charges are sufficient to persuade

[2] *U.S. v. Ernest E. Byrd*, Criminal No. 478-70, U.S. District Court for the District of Columbia. The petitioner was found guilty of the lesser and included offense of Assault with a Dangerous Weapon (he was indicted of the offenses of Assault with Intent to Kill) on February 9, 1972, however an appeal is still pending before the United States Court of Appeals for the District of Columbia which counsel believes could result in a reversal.

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> the Board that Mr. Byrd, at least at this juncture cannot be deemed generally fit for the trust in him reposed under Section 14(a)(1) of the Act (25 D.C. Code 115(a)(1), 1967 Ed.). His alleged conduct is a matter so serious and poses so great a potential danger to the community that the Board cannot continue its approval of him in the active management of Alcoholic Beverage Control Board licensed establishments during the pendency of the criminal matter."

There was no finding made as to the petitioner's moral character although the Show Cause Order was issued to require him to show that his character was not such that he should be denied to apply for liquor licenses as an officer or director of the corporations. No allegations were made as to his general fitness in the Show Cause Order and yet that was the basis for their action.

Three days later, on Monday, February 22, 1971, Boardmember Rufus W. Peckham, Jr., sent to Judge Gerhard A. Gesell and unsolicited copy of the Order with a cover letter (See Appendix E) stating that "it occurred to the Board that the Court might wish to be apprised of certain other developments involving the same principals." At the time, Judge Gesell had Civil litigation pending before him which was closely related to the incident in the Sportsman's Lounge. He also had been assigned the Criminal case involving this incident. The Board did not notify the petitioner or his counsel of this action and counsel did not know of it until attending a status hearing in Judge Gesell's chambers. At that time, Judge Gesell advised that he had received the letter and Order but that he had read no more than the cover letter. This was on March 19, 1971, one month after the letter was sent. An appeal was duly filed with the Commissioner-Mayor.

By letter dated April 16, 1971, the Honorable Walter E. Washington, Commissioner-Mayor of the District of Columbia, notified counsel that he was sustaining the Suspension Order of the Alcoholic Beverage Control Board. Leave was given to file Exceptions to said ruling and said Exceptions were duly filed by petitioner's counsel. They were based on two grounds: (1) Prejudice on the part of the Board members and (2) That the Order of the Board was unconstitutionally vague and inconsistent with the charges.

It was alleged by petitioner's counsel that at the same time, February 21, that Mr. Peckham was sending Judge Gesell an unsolicited copy of his Order, he was placing unsolicited phone calls to petitioner's counsel explaining that although he was not in accord with the Order, he voted as he did to "save his own scalp."

On May 6, 1971, Mrs. Joy R. Simonson, Chairman of the District of Columbia Alcoholic Beverage Control Board, sent a Memorandum (Appendix F) to the Mayor which she referred to under a printed heading of "Subject" as "Requested Response to Ernest E. Byrd, Petitioner." Neither of the parties to this exchange of correspondence sent copies to petitioner or his counsel.

The Chairman forwarded to the Mayor a statement apparently from Boardmember Peckham attacking petitioner's counsel and in which he referred to Exceptions filed on behalf of petitioner as "the most contemptible document this writer has ever seen from a member of the Bar. It is a psychotic amalgamation of distortions, innuendoes, half-truths and outright falsehoods." Appendix G.

Although the Mayor made his ruling sustaining the Alcoholic Beverage Control Board's Order partly based on their solicited responses (see Appendix H), neither

petitioner nor his counsel were apprised of their existence until referred to in the said affirmation notice.

Copies of these responses were sought immediately after the Order was received yet it was only after a number of requests, before the responses were finally delivered to petitioner's counsel, some weeks later.

Petitioner filed a Petition for Review in the District of Columbia Court of Appeals on June 23, 1971. Three issues were raised: (1) Violation of petitioner's due process in the hearing on the grounds of the finding not being consistent with the charges. (2) The acts of prejudice in sending the United States District Judge a copy of their Order as well as the ex parte correspondence sent to the Mayor by the members of the Board, showed a veiled pattern of behavior reflecting that their finding and Order were arbitrary, capricious and discriminatory. (3) The vagueness of the Order made it impossible to enforce.

On April 17, 1972, the District of Columbia Court of Appeals affirmed and granted ten days to request an en banc hearing. An en banc hearing was denied on May 4, 1972, at which time the Mandate affirming was handed down.

REASONS FOR GRANTING THE WRIT

I.

THE BOARD'S ORDER IS VOID IN THAT IT VIOLATES DUE PROCESS

Section 14(a) of the Act provides that before a license is issued the Board shall satisfy itself:

> (a) . . . 1. "That the applicant . . . is of good moral character and generally fit for the trust to be in him reposed." . . .

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Petitioner was charged under that section.

That Section (codified at 25 D.C. Code 115) requires that the Board, before issuing a license, must be satisfied that the applicant is of good moral character and generally fit for the trust to be in him reposed. The Board made no finding regarding the moral character of the petitioner. Nor did the Board find that applicant "has failed to carry out the good faith provisions of Section 17 of said Act," as charged in the Show Cause Order.

While an administrative agency has more leeway than a Court in conducting its proceedins, nevertheless, "The constitutional guaranty of due process of law applies to, and must be observed in, administrative as well as judicial proceedings, particularly where such proceedings are specifically classified as judicial or quasi-judicial in nature, or where the legislature is deemed to have intended the due process safeguard to apply." *2 Am Jur 2d. 163.*

> "Whether a person has been deprived of due process of law by the action of an administrative agency depends upon whether it acted contrary to the statutes and rules and with arbitrary and unreasonable discrimination." *2 Am Jur 2d. 166.*

> "Also the question whether a particular finding must be made in order to sustain an Order depends upon the *substantive* terms of the particular statute under which the Order is made. *The administrative agency must find what the statute requires. . ." 2 Am Jur 2d. 256, 257,* citing *Power Reactor Develop. Co. v. International Union of Electrical, R. & M. W.*, 367 U.S. 396, and *United States v. Fish*, 268 U.S. 607. (Emphasis added).

The Statute herein requires the Board to find that petitioner herein does not possess good moral character

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and is generally not fit for the trust in him reposed. Not only does the Statute so require, but the Board charged him so. In addition, the Board charged him with failing to carry out the good faith provisions of Section 17 of the Act. The Board's findings are silent on this point as well.

Findings of an administrative agency must in particular cases conform to the Statute governing the particular proceeding, both as to form *and content.* See *2 Am Jur 2d. 266.* The Board's failure to find that petitioner lacked the requisite moral character renders the Order of the Board void. See *2 Am Jur 2d. 257.*

II.

DUE PROCESS DENIED; BOARD'S ACTION BASED ON ONE ISOLATED INCIDENT

Assuming, arguendo, that by applying the most extremely liberal construction to the Board's findings one could reach the conclusion that the petitioner was found to lack good moral character, nevertheless the record could not support such finding as required by the authorities as hereinafter set forth.

What constitutes good moral character? While no authorities were found construing the meaning of that phrase as it pertains to an applicant for an A.B.C. license, the phrase has been construed by the Courts in the fields of naturalization and applications for admission to the Bar, where the standards imposed, by the nature of the particular proceeding, would surely be higher than in the instant case.

The Nationality Act of 1940 (8 U.S.C. 707(a)(3) provides:

> "No person . . . shall be naturalized unless such petitioner . . . during all the periods referred to in

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this subsection has been and still is a person of good moral character." . . . (The period referred to is five years prior to applying for naturalization).

In *Ralich v. United States*, 185 F.2d 784 (1950, 8th C.) the Court stated,

. . ."Character implies moral *qualities* which belong to and distinguish an individual person, and signifies the reality as distinguished from reputation or the opinion generally entertained of him." (Emphasis added).

In *Petition of DeLeo*, 75 F. Supp. 896 (1948, D.C., Pa.) that Court stated that,

. . ."Good moral character which an alien seeking naturalization must prove results from the *acts and conduct* of an individual." (Emphasis added).

The Courts have measured *qualities and acts* to reach the conclusion on the issue of good moral character by two tests. One test is that good moral character is one which measures up as good among the people of the community in which the applicant lives; that is, up to the standards of the average citizen. The other test is not what standards the Court itself might approve, but whether the moral feelings now generally prevalent in this country would be outraged by the conduct in question; that is, whether it conforms to the generally accepted moral conventions current at the time. See *22 ALR 2d. 250.*

In the application of either of these tests to specific cases the Courts have covered the entire gamut of crimes or other antisocial conduct committed by the persons involved. But one principle permeates every decision, which is, that no one specific act, in isolation, is sufficient to reach a conclusion on the moral character of an individual.

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In *Marcantonio v. United States*, 185 F.2d 934, (1950, 4th C.) the Court held that the petitioner was of good moral character even though in his earlier life he had been convicted three times for violation of the liquor laws and had served a sentence for assault with the intent to commit murder.

In *Petition of Sparacio*, 30 North Co. R. 302, (1946, Pa.) the Court held that the petitioner who had committed murder (outside the statutory five year period) was not precluded from establishing good moral character. This case and others cited herein concerned with naturalization petitions can be found in ALR 2d. Vol. 22.

In *Daddona v. United States*, 170 F.2d 964 (1948, 2nd C.) the petitioner was granted naturalization even though several weeks before the statutory five year period he killed a man in an affray for which he pleaded guilty and during part of the requisite five year period he was in jail serving his sentence. The Court held, over objection of the government, that even though his conduct was severely limited while in jail, nevertheless he had during that time the opportunity to demonstrate good or bad moral character.

In *Petition of Sperduti*, cited at *22 ALR 2d. 265*, an alien was admitted to citizenship notwithstanding that twenty-five years prior to filing his petition, he had been convicted of murder and sentenced to death, which sentence was later commuted first to life imprisonment and then to ten years and one month. He was allowed to show that he later led a moral life, which, apparently the Court considered of substantial importance.

In the instant case, the evidence, except for the one incident in question, is devoid of any immoral or anti-social conduct by this petitioner.

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In *Minkoff v. Payne*, 93 U.S. App. D.C. 123 (1953) the evidence showed that appellant engaged in more than one act of questionable or immoral conduct, including *violations* of the law.

The Court in reference to one specific criminal charge said:

> "Though it is questionable whether the compromise alone (of the criminal charge) would constitute substantial evidence sufficient to sustain the findings of the Board, *consideration of it along with the ample testimony of the alleged bootleggers* did not deprive the Board's findings of validity."... (Emphasis added).

The principle that an act must be considered in the light of all of the circumstances surrounding it along with the total conduct of the person to reach a judgment on the issue of "moral character", has been reiterated in the following cases involving applicants for admission to the Bar.

In *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1967) the applicant was rejected in that he failed to satisfy the Board as to the requisite moral character for admission to the Bar. His rejection was based on his use of aliases, his former connection with subversive organizations, and his record of arrests.

The sole question before the Court was could the Board reasonably find that the applicant had not shown good moral character.

In its opinion the Supreme Court annunciated the following principle, which is most appropriate to the instant case,

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or

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for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."

The Court concluded that in the light of all the circumstances surrounding the questioned conduct, it was not sufficient to show lack of good moral character.

In *Konigsberg v. State Bar of California*, 353 U.S. 252, (1967) applicant was denied admission to the California Bar, also on the grounds that he failed to show good moral character in that, in 1941, he attended Communist party meetings and he refused to answer certain questions about his political association and beliefs.

The Court ruled that his membership in the Communist party in 1941 did not show a lack of good moral character, and that his refusal to answer questions could not be cited to show his lack of truthfulness, candor, or general moral character.

In *Re O—*, 73 Wis. 602, 42 N.W. 221 (1899) the Court said that the words "good moral character" are general in their application, but that they include of course *all the elements* essential to make up such character, among these being *common honesty and veracity*.

The application of a charge of violating the law to the issue of "good moral character" was pronounced by the New York Appellate Court in, In *Application of Cassidy*, 268 App. Div. 282, 51 NYS 2d. 202 where an application for admission to the Bar of New York was considered. The Court said,

"Conduct not descending to the level of guilt of the violation of a criminal statute may well present insuperable obstacles to admission to the bar if such conduct evinces a lack of that *character and general*

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fitness requisite for an attorney and counsel at law." . . . (Emphasis added)

In the District of Columbia our appellate court also considered the question of good moral character. In upholding the refusal to admit an applicant to the Bar, the Court concluded that the applicant's falsely answering numerous questions on *four separate applications* for admission indicated that he lacked good moral character. See *Carver v. Clephane,* 78 U.S. App. D.C. 91 (1943).

An examination of the evidence adduced in the instant case in the light of the above-mentioned principles can only lead to the conclusion that there was a lack of substantial evidence for the Board to decide adversely on the question of "good moral character."

Substantial evidence is a requisite to upholding the decision of an administrative agency. Lack of substantial evidence renders the decision arbitrary, capricious, and unreasonable. See: *Minkoff v. Payne* (Supra); *S.E.C. v. Cheney Corp.,* 332 U.S. 194, *Eastland Co. v. F.C.C.,* 67 App. D.C. 316; *Mackay Radio & Telegraph Co. v. F.C.C.,* 68 App. D.C. 336, *E. Anthony & Sons v. N.L.R.B.,* 82 U.S. App. D.C. 249; *Mississippi River Fuel Corp. v. Federal Power Commission,* 82 U.S. App. D.C. 208.

Assuming the worst possible inferences from this one incident in petitioner's life, which was the only matter before the Board, it cannot and should not be considered in isolation. A man's character cannot be judged fairly in that manner.

Petitioner produced nineteen character witnesses who, in summary, testified that petitioner had a reputation for peace and good order. Apparently, because most were employees, former employees, and customers, the Board

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made light of this. No witnesses had to be subpoenaed. Human nature being what it is, former employees do not come forward voluntarily to testify to a former employer's good character if that former employer were a type who must lose his license to earn a livelihood because he is devoid of moral qualities; also customers would be "former customers" if he were that type of businessman.

In light of the foregoing authorities and the principles enunciated therein, and the record in the instant case, it is respectfully submitted that the action of the Board in suspending the right of petitioner to operate his licensed establishments was of such an arbitrary, capricious, and unreasonable nature as to amount to a denial of due process and therefore should be vacated and set aside.

III.

THE ORDER OF FEBRUARY 19, 1971, WAS PREDICATED ON PREJUDICE AGAINST PETITIONER

An Order of an administrative agency cannot stand if it is arbitrary, unreasonable, and discriminatory. If an Order is predicated on prejudice, it surely must fall as arbitrary, unreasonable and discriminatory.

The cavalier dismissal of the testimony of nineteen character witnesses on the grounds that "Most of these witnesses were employees or former employees of Mr. Byrd, some were customers of his restaurant" was the only indication that any consideration was given to any other evidence besides the incident in the Sportsman's Lounge.

It is true that these allegations of prejudice were introduced for the first time in petitioner's appeal to the

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Mayor. Petitioner did not have substantial evidence, prior to that time, not because he was lacking in diligence but rather because the Board chose to conceal its actions. There are two specific acts to which the petitioner can refer the Court which cannot possibly be interpreted in any other way but to reflect a fundamental bias and prejudice towards petitioner.

By letter dated February 22, 1971, Mr. Peckham transmitted the Order of February 19, 1971, to Judge Gerhard A. Gesell, who had pending before him the very same criminal charges which gave rise to that Order. Mr. Peckham did not see fit to inform petitioner or his counsel of this action. Consequently, it was not until March 19, 1971, when petitioner appeared before Judge Gesell for a status hearing, that petitioner learned of this action by Mr. Peckham. If, as he stated in his response to petitioner's Exceptions filed with Mayor Washington, Mr. Peckham "lays respectful claim to being an attorney at law of some modest experience" then he must know that the Order of February 19, 1971, was not final until petitioner exhausted his appellate rights. Yet, three days later, Mr. Peckham transmitted the Order to a Federal Judge who was eventually to preside over the criminal trial of these very same facts. What other purpose, except prejudice against petitioner, could have motivated this member to attempt to influence a Federal Judge even before the time had expired for petitioner to take his first appellate step.

On May 6 and May 10, 1971, the Board Chairman and Mr. Peckham filed responses to petitioner's Exceptions with Mayor Washington. They were in the form of office memoranda from a branch of the District of Columbia Government to its Chief Executive. Copies were not furnished petitioner's counsel. Surely professional

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courtesy, if not the rules of procedure themselves, dictated that all responsive pleadings be furnished to opposing counsel. However, in this case the Commissioner-Mayor is sitting as a reviewing tribunal of the trial conducted by the Boardmembers. This extraordinary correspondance would be similar to having a United States District Court Judge writing a letter to the Appellate Judges sitting on the Circuit Court of Appeals reviewing a trial he conducted. The Corporation Counsel, being the legal branch of the District of Columbia Government, ordinarily files responses to petitioner's Exceptions and in this instance he filed no pleading and left counsel for petitioner to believe that the charges of prejudice were going unchallenged. The prejudicial effect of the covert communications served to make a sham of the "independent" review the Commissioner-Mayor was making of the hearing.

The first time that petitioner became aware of the responsive pleading was in the Commissioner-Mayor's Order affirming the action of the District of Columbia Alcoholic Beverage Control Board. In it, reference was made to responsive pleadings. Petitioner's counsel immediately demanded copies of the pleading from the Corporation Counsel. Nearly three weeks later, after numerous demands, copies were finally furnished counsel.

Because of this, petitioner was denied the opportunity to refute the allegations before the Commissioner-Mayor handed down the final Order.

The response by Boardmember Peckham contained a vicious personal attack against petitioner's counsel in the most scurrilous language. Yet nobody in the District of Columbia Government saw fit to notify petitioner's counsel and especially not the author who chose to shroud his prejudice and bias by means of this secret missive.

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What other motive except prejudice could have impelled the Board to conceal its response from petitioner or his counsel, especially when viewed in concert with the covert correspondence addressed to Judge Gesell earlier.

An Order which is predicated on personal bias and prejudice surely must be void in that it is arbitrary, unreasonable and discriminatory. A hearing under such conditions lacks fundamental due process of law.

It is asserted that these two incidents bear witness to a personal prejudice and bias towards the petitioner. No motivation other than prejudice could have impelled the author of the letter to Judge Gesell. This letter could do nothing but harm the petitioner and it was mailed the first working day after the Order was issued.

As a matter of fact, in the body of the letter to Commissioner-Mayor Washington, the same Boardmember states that his enlightened philosophy is "that one mistake should not necessarily deprive a person of their livelihood." Since the Order was based on one incident in petitioner's life, the Boardmember's vote was inconsistent with this statement of personal belief which is further evidence that it was based on personal prejudice and bias.

Based on the above premises, it is respectfully submitted that the action of the Board in suspending the right of petitioner to operate his licensed establishments was based on personal prejudice and bias and should be vacated and set aside.

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CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN LOUIS SMITH, JR.
9th Floor, Presidential Bldg.
6525 Belcrest Road
Hyattsville, Maryland 20782
Counsel for Petitioner

August, 1972

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APPENDIX A

BEFORE THE ALCOHOLIC BEVERAGE CONTROL BOARD
IN THE DISTRICT OF COLUMBIA

IN RE: 2447 GOOD HOPE ROAD, INC.
t/a Clancy's No. 3
Holder of a Retailer's Class "C"
License No. X122, at premises
2447-51 Good Hope Road, S.E.
Application No. 8437

2301 BLADENSBURG ROAD, INC.
t/a Clancy's
Holder of a Retailer's Class "C"
License No. X306, at premises
2301 Bladensburg Road, N.E.
Application No. 9557

2213 WISCONSIN, INC.
t/a The Beef Palace
Holder of a Retailer's Class "C"
License No. X396, at premises
2213 Wisconsin Avenue, N.W.
Application No. 9534

BIL-MAR, INC.
t/a The Office
Holder of a Retailer's Class "C"
License No. W049, at premises
1223 13th Street, N.W.
Application No. 8389

EXECUTIVE CLUB, LTD.
t/a The Executive Club Restaurant
Holder of a Retailer's Class "C"
License No. X503, at premises
1520 K Street, N.W.
Application No. 9401

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SUMMARY OF HEARING AND FINDING OF THE BOARD

On January 26, 1970, the Alcoholic Beverage Control Board issued an order calling on the above corporations to show cause why their applications for re-issuance of their retail class "C" licenses should not be denied on the grounds that a principal officer in each of said corporations, Mr. Ernest E. Byrd, was not a fit person to hold an alcoholic beverage license under the standards of Section 14(a)1 of the Act. The original hearing date on said order was February 3, 1970. For a variety of reasons, not relevant to the finding herein, the matter was continued several times until January 14, 1971. In the interim and continuing at the present time, the licenses in question were reissued pending the outcome of the instant hearing.

MEMBERS OF THE BOARD INITIALLY PRESENT:

JOY R. SIMONSON
JOHN F. MIDDLETON
RUFUS W. PECKHAM, JR.

FOR THE RESPONDENTS:

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FOR THE GOVERNMENT:

SEMI FEUER
Assistant Corporation Counsel, D.C.

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Of the original seven applicants, two businesses have since been closed and are no longer licensees; namely, 2134 Pennsylvania, Inc., 2134 Pennsylvania Ave., N.W., and Frankie's, Inc., 1113 15th St., N.W. These corporations have therefore been discharged from these proceedings.

The Board was advised that there is civil litigation presently pending between Mr. Byrd and Messrs. Daniel Harris and Oliver Agramonte, who are the other principal officers in the respondent corporations. Judge Gerhard Gesell, of the U.S. District Court for the District of Columbia, has issued a consent order under which Messrs. Agramonte and Harris are operating Bil-Mar, Inc., and Executive Club, Inc., while Mr. Byrd is operating the other three corporations pending trial of the matter. Inasmuch as all three remain officers of record and retain claims to interest in all five corporations, Messrs. Harris and Agramonte were represented in the proceedings before the Board by Harold Rogers, Esq. while Mr. Byrd was represented by John H. Treanor, Jr., Esq. and John L. Smith, Jr., Esq.

Mr. Treanor moved that the proceedings be continued until adjudication of the criminal charges pending against Mr. Byrd on the grounds that a proper defense before the Board would require waiver of Mr. Byrd's constitutional rights under the 5th Amendment. The Government argued that, under the precedent of *McCamey v. Silver*, 221 Fed. 2nd 873 (1955), the Board was empowered to hold a hearing and, if so indicated, to suspend the licenses until adjudication of the criminal matter. The Board thereupon denied Mr. Treanor's motion.

Mr. Rogers argued that any penalty which might be assessed against the corporations because of actions of

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Mr. Byrd would penalize his clients unfairly. We, therefore, requested that the matter be continued until the civil suit had been settled. The Board voted to proceed.

The possibility of impropriety under the doctrine set forth in *Amos Treat and Company vs. Securities and Exchange Commission*, 113 U.S. Appeals, D.C. 100, was raised in view of Board Member John F. Middleton's having been on the staff of the Corporation Counsel and participated in the drafting of the show cause order. After request by Mr. Treanor that Mr. Middleton disqualify himself from the case, he did so. The balance of the hearing was conducted by the two undersigned Board Members. At request of counsel, a rule was imposed to exclude from the hearing room witnesses other than the one on the stand.

Mr. Stanley Janulewicz testified that he is the holder of three retail class "C" licenses in the District of Columbia, he is the president of the Restaurant Beverage Association and he has known Mr. Byrd through the association for some time. He testified to the events on the evening of October 22, 1969, as follows:

He met James O'Donnell, attorney, at his downtown restaurant early in the evening. They decided to stop in at the St. Regis Restaurant, 2218 Wisconsin Avenue, about 10:00 p.m. for a short visit. Thereafter, they saw across the street, in front of the Good Guys Restaurant, a Mr. Joe Gannon, whom they knew as Mr. Byrd's chauffeur. Mr. Gannon told them that Mr. Byrd was in the Sportsman's Lounge, 2412 Wisconsin Avenue, and suggested they go there to see him. When they entered the Sportsman's Lounge, which had some 30 patrons, Mr. Byrd waved them over to where he was standing near the bar. After drinks and general conversation, Mr. Byrd

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inquired of Mr. O'Donnell how Mr. Agramonte had become a director of so many of his(Byrd's) corporations; Mr. O'Donnell replied, "Go down to the ABC Board and check the records." In what Mr. Janulewicz described as a friendly tone, Mr. Byrd then said, "I ought to blow your head off." Mr. Janulewicz moved in between the two men as Mr. Byrd was reaching into his belt under the left side of his coat. Thereupon Mr. Janulewicz heard shots, he believes two shots, although he did not actually see a weapon or a discharge. Then Mr. O'Donnell and others ran out of the front door, leaving Janulewicz alone in the restaurant. After a couple of minutes, he started out of the restaurant and met Mr. Byrd apparently re-entering. The latter came up to him, put a gun against his stomach and said, "Now it's your turn." Janulewicz pushed Byrd's arm away while three shots were fired, one of which hit Janulewicz' right leg. He wrestled the gun out of Byrd's hand, left the premises and went to the Old Europe Restaurant nereby where he asked the owner to call the police. When they came, he surrendered the weapon and was taken first to a hospital and then to the police precinct.

Under cross examination, Mr. Janulewicz said that he had heard of feuding between Mr. Byrd and Mr. O'Donnell but had no opinion on it. He responded that he and O'Donnell had had a drink at the St. Regis and one or two at the Sportsman's Lounge but that there was no sign of intoxication.

Mrs. Nancy Lee Taylor testified that she had been a waitress at the St. Regis on October 22, 1969, and had gone to the Sportsman's Lounge about 10:15 to have a drink. Sitting on a bar stool, she saw Messrs. Byrd, O'Donnell and Janulewicz standing near her. When she

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heard a loud sound, she turned and saw Mr. Byrd with a gun pointed at Mr. Janulewicz and all three men struggling together. She ran for cover, heard additional shots and came out sometime later. When she came out, she saw Mr. Byrd wrestling with a policeman.

Howard N. Williams, Jr., owner of the Sportsman's Lounge, testified that at the beginning of the incident in question, he was in the kitchen, heard the gunfire and screams and came out to see Byrd and O'Donnell struggling. Mr. O'Donnell ran out the door. Mr. Byrd followed him and several others, including Williams, also followed. Williams saw Byrd return and meet Janulewicz about to leave the restaurant. There was a struggle between them and shots were fired after which Mr. Janulewicz ran out the door carrying a gun, screaming that he had been shot. Mr. Byrd went to the rest room and then left the restaurant. After the police came, they brought Mr. Byrd back to the restaurant and Williams saw a struggle between Byrd and O'Donnell.

Sgt. Charles Poole, Metropolitan Police Department, testified that he responded to a radio run about 11:00 p.m., October 22, 1969, for a man who had been shot at the Old Europe Restaurant. He identified Government's exhibit Number 1 as the Smith & Wesson, 5 round capacity caliber .38 special revolver which Mr. Janulewicz gave him that evening and said that it contained 5 spent cartridge cases and had recently been fired. The Sgt. said that he next went to the Sportsman's Lounge and interviewed Mr. O'Donnell, who told him that Mr. Byrd had shot Mr. Janulewicz and was probably then at the Good Guys Restaurant. When the sergeant found Mr. Byrd at the Good Guys with Mr. Gannon, Byrd first denied having been at the Sportsman's Lounge, then admitted it but denied having shot anybody. Byrd

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returned to the Sportsman's Lounge with the officer, punched Mr. O'Donnell and knocked him to the floor, whereupon Mr. Byrd was arrested for assault with a dangerous weapon. The sergeant testified further that the revolver was not registered and that Mr. Byrd did not have a permit to carry it. He stated that he was able to find three bullet holes in different areas of the restaurant which could be "wild firing." Under further questioning, the sergeant stated that there were powder burns on Mr. O'Donnell's hand. He said that Mr. Byrd and Mr. O'Donnell appeared to have been drinking that evening, although he had not seen Mr. Byrd drinking before or after the incident. He said that he had no more problems with Mr. Byrd's licensed establishments than with others in his district and that in the last year Mr. Byrd appeared to have been law-abiding.

When the hearing continuted on January 25, 1971, Mr. James O'Donnell testified similarly to Mr. Janulewicz concerning the early part of the evening of October 22, 1969. Concerning the events in the Sportsman's Lounge, he testified as follows:

He and Mr. Janulewicz joined Mr. Byrd and some others, had drinks and general conversation relating to business, football, etc. Mr. Byrd then said that he didn't understand how Mr. Agramonte was listed on so many of his corporations. Mr O'Donnell suggested that he go down to the ABC Board to check the files. Byrd then said, "I ought to blow your so-and-so head off." O'Donnell responded, "With what?" Byrd pulled a gun out of his belt. O'Donnell shoved it up with his left hand and the gun fired at the ceiling. After a brief struggle, O'Donnell left the premises and went to the nearby Grog and Tankard Restaurant. O'Donnell soon saw Mr. Byrd walk

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down Wisconsin Avenue with two men. O'Donnell then returned to the Sportsman's Lounge and was told that Janulewicz had been shot. When Sgt. Poole and other police officers arrived, O'Donnell suggested that Byrd might be in the Good Guys or Beef Palace Restaurant. When Byrd came into the Sportsman's Lounge with the police, he hit O'Donnell and was then removed by the police. Mr. O'Donnell was cross examined at length on has past representation of Mr. Byrd in a number of restaurants. He also discussed an insurance problem about which Mr. Byrd had consulted him. He stated that he had ceased representing Mr. Byrd several times, the last one being July 1969. Between that time and October 22, he had received no threats from Mr. Byrd and said that his split-up with him had been amicable, at least on O'Donnell's part. He added that the greetings in the Sportsman's Lounge were friendly and that he did not know that Mr. Byrd carried a gun. He stated that he believed at the time and believes now that Mr. Byrd intended to shoot him when he reached for his gun. Since that time, he said he has received no threats from Mr. Byrd.

For the respondent, Mr. Kenneth Lee Mandeville testified that he was employed by Mr. Byrd as a restaurant manager. On October 22, 1969, he went with Mr. Byrd and Ralph Adams to the Good Guys and then to the Sportsman's Lounge. While drinking, he saw Mr. O'Donnell come in with someone, greet Mr. Byrd and converse. Ten or fifteen minutes later, he heard a scuffle, turned and saw Mr. Byrd's right hand at his rear pants pocket. He then heard shots but did not see a gun. He had not heard the conversation preceeding the shooting. He ducked for cover and did not see any encounter between Byrd and Janulewicz. Subsequently, he left the

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restaurant with Mr. Adams and Mr. Byrd. He said they may have returned to the Good Guys, but he had no recollection of their conversation before he went home.

Ralph J. Adams, a locksmith, testified that he has known Mr. Byrd for about ten years. He corroborated Mr. Mandeville's testimony and said that he saw Mr. Byrd's hand come out of his pocket with a handkerchief, then heard gunfire but did not see a gun. Subsequently, he tried to separate Mr. Byrd and Mr. Janulewicz as they were grappling with a gun which went off. He did not observe any injury before he saw Mr. Janulewicz leaving with the gun in his hand. He stated that he does not know if Mr. Byrd carried a gun on that occasion or others.

Mr. Robert R. Smith, owner of Mr. Smith's Restaurant at 3104 M Street, testified that he has known Mr. Byrd since 1960. In his conversations with other members of the industry, he reported that Mr. Byrd had a reputation as one of the best operators, one who maintained a "tight ship."

Nineteen character witnesses then took the stand to testify that they knew Mr. Byrd to have a good reputation for "peace and good order." Most of these witnesses were employees or former employees of Mr. Byrd; some were customers of his restaurant.

The Board has given most careful consideration to all of the testimony, evidence and arguments in this case and is fully appreciative of the fact that five lawful businesses having significant payrolls and gross revenues are deeply involved in the resolution of this matter. We are appreciative, too, of the fact that due to the still-pending criminal charges against Mr. Byrd, he felt unwilling or unable to testify on his own behalf concerning the events

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in question. Nevertheless, the serious nature of the criminal charges now pending against Mr. Byrd and the evidence supporting those charges are sufficient to persuade the Board that Mr. Byrd, at least at this juncture, cannot be deemed generally fit for the trust in him reposed under Section 14(a)1 of the Act (25 D.C. Code 115(a)1, 1967 Ed.). His alleged conduct is a matter so serious and poses so grave a potential danger to the community that the Board cannot continue its approval of him in the active management of Alcoholic Beverage Control Board licensed establishments during the pendency of the criminal matter.

Although the Board could deny reissuance of the licenses in question or suspend them pending final disposition of the charges, such action would work a harsh and inequitable result on persons who are entirely unconnected with Mr. Byrd's alleged conduct and, conceivably, on Mr. Byrd, himself.

ORDER

Accordingly, having considered the testimony, the evidence adduced and the arguments of counsel, it is by the Board this 19th day of February, 1971, ORDERED that Earnest E. Byrd be and he hereby is SUSPENDED from all officerships and/or directorships in the above corporations and he is further SUSPENDED from any active role in the management of the business of said corporations and all Alcoholic Beverage Control Board managers certificates heretofore issued to him are also SUSPENDED.

And it is further ORDERED that within thirty (30) days of the date of this Order, the aforesaid corporations shall cause to be filed with the Board certified copies of

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appropriate corporate minutes indicating that the foregoing has been done. Failure to do so or failure of Mr. Byrd to observe the terms of this Order shall be considered cause for the Board to suspend all applicable alcoholic beverage control licenses during the pendency of the criminal charges.

The foregoing interlocutory suspensions shall remain in effect pending final disposition of the criminal charges lodged against Mr. Byrd at which time the Board shall reopen this matter for further hearing and such further action as the public interest may require.

Subject to the foregoing, the application for reissuance of the corporate alcoholic beverage licenses in question are hereby APPROVED.

ALCOHOLIC BEVERAGE CONTROL BOARD
IN THE DISTRICT OF COLUMBIA

/s/ Joy R. Simson
/s/ (illegible)

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APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 5919

ERNEST E. BYRD, PETITIONER,

v.

DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD, RESPONDENT.

On Petition for Review of Order of the
District of Columbia Alcoholic Beverage Control Board

(Submitted January 17, 1972 Decided April 17, 1972)

Michael Ritz, Jr. for petitioner.

C. Francis Murphy, Corporation Counsel, *Richard W. Barton* and *Earl A. Gershenow*, Assistant Corporation Counsels, for respondent.

Before HOOD, Chief Judge, KELLY, Associate Judge, and QUINN, Associate Judge, Retired.

PER CURIAM: Petitioner seeks reversal of an order of the District of Columbia Alcoholic Beverage Control Board (the Board) suspending him from "all officerships and/or directorships" and from "any active role in the management" of five corporations, restaurants and bars, licensed with the Board pending final disposition of criminal charges against petitioner in the United States District Court.

The Board's action was taken pursuant to an order to show cause why the corporate applications for renewal of retail Class "C" liquor licenses should not be denied on the grounds that petitioner, a principal officer in each of

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the corporations, failed to possess the "good moral character" required by the District of Columbia Alcoholic Beverage Control Act. D.C. Code 1967, § 25-115(a)1 (Supp. IV, 1971). The show cause order alleged that petitioner at a specific date, time and public place carried a dangerous weapon and assaulted two persons, one of whom was wounded, with a .38 caliber revolver—the incident out of which the criminal charges grew. From substantial evidence in the record the Board found that petitioner "cannot be deemed generally fit for the trust in him reposed under section 14(a)1 of the Act" (D.C. Code 1967, § 25-115(a)1 (Supp. IV, 1971) and granted renewal of the licenses subject to the personal suspension of petitioner.

Petitioner makes three arguments.[1] First he contends that due process was denied him because the Board failed to find, pursuant to § 25-115(a)1, that he lacked "good moral character" as charged but instead pinned its decision on a finding that he was not "generally fit for the trust in him reposed". The short answer to this contention is that, under the statute, the Board may deny renewal of a license on a finding of unfitness, a determination in which the applicant's "moral character" plays an essential part, and, as appears from the record, petitioner contemplated and directed his defense in relation to the former element as well as the latter.[2]

Secondly petitioner contends that the Board's order was tainted by prejudice pointing mainly to the actions of one member of the Board. We are unable to find convincing support for petitioner's assertion and believe he was accorded an abundantly fair opportunity to defend.

Lastly it is argued that the order is too vague to be enforceable. The order, suspending petitioner from any

[1] A serious question, not raised here, is whether the Board had the authority to impose the sanction it did. *See* Press Liquors, Inc. v. Weakley, 115 U.S.App.D.C. 71, 73, 317 F.2d 125, 127 (1963).

[2] Minkoff v. Payne, 93 U.S.App.D.C. 122, 210 F.2d 669 (1953) makes clear that the same qualifications required for an original license apply to renewals.

means of actively managing the five corporations, was sufficiently definite to apprise him of the particular conduct proscribed. Accordingly, the order of the Board is

Affirmed.

KELLY, J., dissenting:

By letter of April 16, 1971, the Mayor-Commissioner of the District of Columbia informed petitioner's counsel that after reviewing the record of the hearing and after consideration of written arguments filed on appeal, he proposed to adopt the findings and order of the Alcoholic Beverage Control Board suspending petitioner from all officerships and/or directorships in certain corporations, suspending him from any active role in the management of the business of these corporations, and suspending all Alcoholic Beverage Control Board manager's certificates theretofore issued to petitioner. Counsel was granted permission to submit exceptions or argument in writing to the Commissioner within ten days.

Thereafter, counsel filed written exceptions to the proposed order in which he alleged that the Board's decision was "predicated on prejudice against the petitioner" rather than on the facts of the case. Serious charges of impropriety were made against one member of the Board centering on the substance of telephone conversations between that member and petitioner's counsel and on the fact that the Board member had sent an allegedly unsolicited copy of the Board's findings and order to the federal judge before whom criminal charges against petitioner, as well as related civil matters, were pending. A response from the Board to petitioner's exceptions was requested and received by the Commissioner,[1] who, thereafter,

[1] Separate responses were made by the two Board members who decided the case. The third member of the Board had disqualified himself at the outset of the hearing.

formally affirmed and adopted the Board's findings. Copies of the responses were not sent to counsel when made and the copies sent to him thereafter at his request were not received until the petition for review was filed in this court. As a result, and in order to refute statements of one Board member to the Commissioner, the petition for review was supplemented with a transcript of one telephone conversation, prepared by the Internal Investigations Unit of the Metropolitan Police Department, which Unit had recorded the conversation with the consent of petitioner's counsel.

Since we are apprised of this additional evidence which petitioner was effectively precluded from presenting on his appeal to the Commissioner, and since in my judgment the effect of this evidence upon the administrative proceedings should first be assessed by the Commissioner, I would remand the case for that purpose rather than decide it on the merits.

APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS

[Filed May 4, 1972]

No. 5919 January Term, 1972

ERNEST E. BYRD,

Petitioner,

v.

DISTRICT OF COLUMBIA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

BEFORE: Hood, Chief Judge, and Kelly, Associate Judge, and Quinn, Associate Judge, Retired

ORDER

On consideration of petitioner's petition for rehearing, it is

ORDERED that petitioner's aforesaid petition is denied.

BY THE COURT:

/s/ ANDREW M. HOOD,
Chief Judge.

Copies to:

Michael Ritz, Jr., Esquire
6525 Belcrest Road
Hyattsville, Maryland 20782
Attorney for Petitioner.

Richard W. Barton, Esquire
Assistant Corporation Counsel, D.C.
Attorney for Respondent.

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APPENDIX D

BEFORE THE
ALCOHOLIC BEVERAGE CONTROL BOARD
IN THE DISTRICT OF COLUMBIA

IN RE: 2134 Pennsylvania, Inc.
t/a Brownie's
Holder of a Retailer's Class "C"
License No. W935 at premises
2134 Pennsylvania Ave. N.W.
Application No. 4272

2447 Good Hope Road, Inc.
t/a Clancy's No. 3
Holder of a Retailer's Class "C"
License No. X122 at premises
2447-51 Good Hope Road S.E.
Application No. 8437

Frankie's, Inc.
t/a Clancy's No. 2
Holder of a Retailer's Class "C"
License No. 9914 at premises
1113-15 15th Street N.W.
Application No. 6660

Bil-Mar, Inc.
t/a The Office
Holder of a Retailer's Class "C"
License No. W049 at premises
1223 13th Street N.W.
Application No. 8389

2301 Bladensburg Road, Inc.
t/a Clancy's
Holder of a Retailer's Class "C"
License No. X306 at premises
2310 Bladensburg Road N.E.
Application No. 9557

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2213 Wisconsin, Inc.
t/a The Beef Palace
Holder of a Retailer's Class "C"
License No. X396 at premises
2213 Wisconsin Ave. N.W.
Application No. 9534

Executive Club, Ltd.
t/a The Executive Club Restaurant
Holder of a Retailer's "C"
License No. X503 at premises
1520 K Street N.W.
Application No. 9401

Order to Show Cause

You are hereby directed to appear before the Alcoholic Beverage Control Board in Room 201, District Building, 14th and E Streets N.W., on February 3, 1970 at 9:30 a.m., to show cause why your application should not be Denied. It is proposed that action be taken based upon the character of one Ernest Byrd, a principal officer of each of the above licensees.

1. It is alleged that Ernest Byrd did, on October 22, 1969, at or about 10:00 p.m., at the Sportsman's Lounge, 2412 Wisconsin Ave., N.W., in the District of Columbia, assault one James F. O'Donnell with a dangerous weapon, to wit, .38 caliber revolver, in violation of the laws of the District of Columbia.

2. It is alleged that Ernest Byrd did, on October 22, 1969, at or about 10:00 p.m., at the Sportsman's Lounge, aforesaid, assault and wound one Stanley Janulewicz with a dangerous weapon, to wit, .38 caliber revolver, in violation of the laws of the District of Columbia.

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3. It is alleged that Ernest Byrd did, while carrying on the conduct as set forth above, possess and carry a dangerous weapon in violation of the laws of the District of Columbia.

4. By virtue of the conduct as set forth above, it is alleged that Ernest Byrd does not possess the good moral character required of an individual, partnership member, or principal officer or director of a corporation, by Section 14(a)1 of the Alcoholic Beverage Control Act, and has failed to carry out the good faith provision of Section 17 of said Act.

The corporation is entitled to be represented by Counsel at the above hearing, although such is not required. The failure of the corporation and each of its principal officers and directors to appear at the above hearing will not preclude the Board from acting in this matter.

ALCOHOLIC BEVERAGE CONTROL BOARD
IN THE DISTRICT OF COLUMBIA

/s/ (Mrs) Joy R. Simonson
Chairman

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APPENDIX E

Government of the District of Columbia
ALCOHOLIC BEVERAGE CONTROL BOARD

February 22, 1971

Hon. Cerhard A. Gesell
United States District Court
United States Court House
John Marshall Place, N.W.
Washington, D.C. 20001

Re: Byrd vs. Lane, et al
CA 1022-70

Dear Judge Gessell:

In view of the fact that Your Honor has the captioned civil action pending for status conference on March 19, it occurred to the Board that the Court might wish to be apprised of certain other developments involving the same principals.

We trust Your Honor will find the enclosure self-explanatory, however, if there is anything further the Court requires, the Board will be most pleased to cooperate.

Very truly yours,

Alcoholic Beverage Control Board

by

/s/ Rufus W. Peckham, Jr.
Member

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APPENDIX F

May 1967

Memorandum • Government of the District of Columbia

TO:	Honorable Walter E. Washington	**Department, Agency, Office:**	ABC Board
FROM:	Mrs. Joy R. Simonson Chairman	**Date:**	May 6, 1971

SUBJECT: Requested Response to Ernest E. Byrd Petition

The following is submitted in response to the request of your office for my comments concerning the petition filed on behalf of Ernest E. Byrd on April 29, 1971, entitled "Exceptions to Proposed Order." I recognize that this document contains allegations to which the Board member primarily involved has not yet had an opportunity to reply. He will be out of the city until May 10, so I am submitting my own comments at this time.

1. I am fully confident that the record of the case substantiates the decision made. Were there any prejudice or bias, however, I believe that the Board member's alleged call to the licensee's counsel would indicate bias toward—not against—the petitioner.

2. I do not comprehend the reference to "worry about his own 'scalp'."

3. The opinion that "one incident in a person's life was not enough bias for depriving him of his means of earning a living" was not expressed to me by Mr. Peckham during our several discussions while reaching our decision on the case. I do recall his remarking that the witnesses for the respondent did not make a strong case at all.

4. I believe that if, as alleged, a Board member visited a licensee's premises and expressed his views on a

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forthcoming citation case, such actions would seriously undermine respect for the ABC Board's position as the regulatory agency for the industry.

5. The Board's Order suspended Mr. Byrd's officerships and managers permits in the corporations in question. It is true that I discussed with Mr. Peckham and also in our conversation with Mr. Murphy the possibility of extending the suspension to include Mr. Byrd's stock ownership. Although we all agreed that it appears illogical for persons who cannot qualify as licensees to be permitted to own stock, even 100%, in licensed corporations (thereby deriving the profits and also being able to handpick the officers and directors who may be nominally in charge of the business), the Board did not extend the Order to include stock ownership because the Acting Corporation Counsel advised us that the present language of the ABC Act and Regulations does not authorize such action. We then discussed in detail with Mr. Murphy to alternatives open to us. The reference to seeking legislation to close the "loophole" in the Act is true but irrelevant to the allegation of prejudice against the practitioner.

6. The letter to Judge Gesell was sent without my knowledge. I was absent on a Government training program the week of February 22 and did not learn of the letter until after the conference in Judge Gesell's chambers on March 19. However, the Board's Finding was a matter of public record and even the subject of a newspaper article.

7. I cannot understand the basis for the Board member saying, as alleged, that after studying the Board's opinion he found that it "doesn't say much of anything." The significant or operative paragraphs of the Board's

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Finding and Order were drafted by Mr. Peckham, himself, after our extensive discussion with Mr. Murphy. Mr. Peckham specifically selected the phrase "generally fit for the trust" rather than "of good moral character" (both phrases are used in Sec. 14(a)1 of the ABC Act) because of the interlocutory nature of this Order. I was not conscious of the minor semantic discrepancy between the Show Cause Order and the Board's Order, but I do not consider it to be significant, especially since Sec. 14 requires to Board "to satisfy itself" that each officer and director of an applicant corporation "is of good moral character *and* generally fit for the trust to be in him reposed." (underlining added.) Although it is occasionally quite difficult, I believe it to be an inherent responsibility of a Board member's position to make judgments concerning moral character in relation to alcoholic beverage licenses.

8. I consider it premature and wholly inappropriate to decide on further action concerning the Board's Order– let alone to communicate such a decision to the interested party. The Board's interlocutory suspension order stated that after final disposition of the criminal charges, "the Board shall reopen this matter for further hearing and such further action as the public interest may require." I cannot see how a Board member could properly determine at this time, having heard no testimony from Mr. Byrd himself, what action might be in the public interest.

Please advise me if there is further information on this matter which you desire from me or from the Board's records.

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APPENDIX G

D.C.-44
May 1967

Memorandum • Government of the District of Columbia

TO:	Honorable Walter E. Washington Mayor-Commissioner	Department, Agency, Office:	ABC Board
FROM:	Mrs. Joy R. Simpson Chairman	Date:	May 10, 1971

SUBJECT: Appeal of Ernest E. Byrd

Attached hereto is a copy of a memorandum from Rufus W. Peckham, Jr., ABC Board Member to me on the above subject.

I believe that Mr. Peckham's comments taken in conjunction with my own memorandum dated May 6 should clarify the entire situation. I trust that the case can proceed on its merits with no further delays caused by personal attacks.

Mrs. Simonson — ABC Board

Mr. Peckham — May 10, 1971

Appeal of Ernest E. Byrd

The purported "Exceptions" is the most contemptible document this writer has ever seen from a member of the Bar.

It is a psychotic amalgamation of distortions, innuendoes, half-truths and outright falsehoods. To take them in order:

Mr. Peckham's telephone call was *not* unsolicited. It was in response to an earlier call from Mr. Treanor requesting Mr. Peckham to call him. Mr. Ritz, who answered in Mr. Treanor's absence, started off by asking (outright, if you please) why the ABC Board Chairman

was prejudiced against his client and why was she seeking to divest him of his corporate stock. Mr. Peckham replied that he was aware of no prejudice but that if Mr. Ritz felt differently he was at liberty to file an affidavit of prejudice to that effect. Mr. Ritz did ask if Mr. Peckham thought the ABC Board had the authority to divest a person of his corporate stock in a licensed establishment, to which Mr. Peckham replied in the negative.

The allegation that Mr. Peckham discussed the Chairman's personal view of the case with Mr. Ritz is an outright falsehood.

Mr. Peckham does not deny visiting Mr. Byrd's premises on various occasions over the years, however, it will be noted that Mr. Peckham is a bachelor and for more than 20 years has eaten his meals at various licensed premises in the District of Columbia, including Mr. Byrd's. Mr. Peckham does not recall the incident where he is alleged to have expounded on his social philosophy, however, he does not deny it and further states that it is in fact an accurate statement of his views (that one mistake should not necessarily deprive a person of their livelihood).

The allegation of personal prejudice on the part of the Chairman is too absurd even to dignify with the formality of a denial as must be obvious from the Board's order which could have just as easily directed the closing of all Mr. Byrd's establishments during the pendency of the criminal charges. Indeed, if any criticism of the Board is justified, it is that it has been excessively lenient in this case.

Mr. Peckham did in fact forward a copy of the Board's Finding to Judge Gesell, who, at that time, had pending before him certain *Civil* matters involving Mr. Byrd. This

quite proper and appropriate action was taken at the suggestion of the judge's secretary. At that time the *criminal* charges against Mr. Byrd were pending before Judge Walsh.

The allegation that Mr. Peckham indicated he would vacate the Board's Order if Mr. Byrd were acquitted is also rediculous. Mr. Peckham lays respectful claim to being an attorney at law of some modest experience and it is not his nature to speculate on unresolved legal matters least of all to exert authority which he clearly doesn't have (speaking for the whole Board). What happened on February 24 was that Mr. Treanor called Mr. Peckham and asked if Mr. Byrd could call a stockholders meeting, etc., etc. Mr. Peckham replied that he knew of no legal disability to the proposed action.

In conclusion, it is apparent from even a cursory reading of this incredible document that there is not a scintilla of substance to it and that Mr. Ritz is "shooting from the hip" in a desperation effort to becloud the matter with sewer sweepings. All legal remedies have thus far seemed to have failed him, so he resorts to the noxious and sordid tactic of attacking the personal integrity of Mr. Peckham and the Chairman, a tactic not entirely unexpected, considering the source.

It is suggested that the "Exceptions" be summarily rejected with the contempt that it so clearly merits and, indeed, consideration might even be given to referring the matter to the Bar Association's Committee on Administration and Grievances.

ep

APPENDIX H

GOVERNMENT OF THE DISTRICT OF COLUMBIA ADMINISTRATIVE ISSUANCE SYSTEM

Commissioner's Order No. 71-172
June 8, 1971

SUBJECT: Suspension of Ernest Byrd from officerships and/or directorships of certain corporations Alcoholic Beverage Control Board

Upon consideration of the Exceptions to the Proposed Order filed and the Response thereto by the Alcoholic Beverage Control Board, IT IS HEREBY ORDERED:

That the findings made by the Alcoholic Beverage Control Board in the matter of Ernest E. Byrd and the Order issued by the said Board on February 19, 1971 suspending Ernest E. Byrd from all officerships and/or directorships in the following named corporations licensed by the Alcoholic Beverage Control Board, and further suspending him from any active role of the management of the business of these corporations and suspending all Alcoholic Beverage Control Board managers certificates heretofore issued to him, are hereby affirmed and adopted.

It is further ordered that within thirty (30) days of the date of this Order, the following named corporations shall cause to be filed with the Alcoholic Beverage Control Board certified copies of appropriate minutes indicating that the foregoing has been done.

1) 2447 Good Hope Road, Inc.
t/a Clancy's No. 3
Holder of Retailer's Class "C"
License No. X122, at premises
2447-51 Good Hope Road, S.E.

2) 2301 Bladensburg Road, Inc.
t/a Clancy's
Holder of a Retailer's Class "C"
License No. X306, at premises
2301 Bladensburg R. N.E.

3) 2213 Wisconsin, Inc.
t/a The Beef Palace
Holder of a Retailer's Class "C"
License No. X396, at premises
2213 Wisconsin Ave. N.W.

4) Bil-Mar, Inc.
t/a The Office
Holder of a Retailer's Class "C"
License No. W049, at premises
1223 13th Street, N.W.

5) Executive Club, Ltd.
t/a The Executive Club Restaurant
Holder of a Retailer's Class "C"
License No. X503, at premises
1520 K Street, N.W.

/s/ WALTER E. WASHINGTON
COMMISSIONER OF THE DISTRICT OF COLUMBIA

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